

Wetland Advisory Council

(Created under 2009 PA 120)

Final Report

August 15, 2012

Introduction

The Wetland Advisory Council (Council) was formed under 2009 PA 120. It was charged with an examination of the existing wetlands regulation. The Council has met regularly since it was formed in January 2010. The Council has been diligent and thorough in its effort to complete the evaluation and make recommendations outlined in the statute. This report completes the work of the Council, and builds upon the initial report submitted to the Legislature on October 1, 2010.

The Council was unanimous in its belief that Michigan should retain its designation as an approved Section 404 Program, making the assumption that necessary legislative changes can be positively concluded. It has concurred with the many programmatic improvements made by the Michigan Department of Environmental Quality (MDEQ) over the last two-and-one-half years and believes these changes will have a significant positive impact on the regulated community in the future. The Council is supportive of the current direction and approach taken by the MDEQ to administer the program going forward.

The work of the Council has been consensus based. Although not every member was in complete agreement with all recommendations incorporated, the recommendations are by consensus. The report contains notes of concern by individual members where relevant. Additionally, the Council was aware of other wetland issues concurrently being discussed or debated in the Legislature. The Council declined to take positions on issues that it was not charged with under 2009 PA 120.

A major factor in the creation of the Council involved a state response to a United States Environmental Protection Agency (USEPA) review of the state's administration of the approved Clean Water Act 404 Program. The review identified several deficiencies and proposed corrective actions to bring the Michigan Program in compliance. Of the 22 issues identified, 19 were addressed by the MDEQ internally or through the Council. The remaining three issues relate to exemptions for utilities, drains, and agriculture practices from regulation under the Michigan program. These issues require statutory changes. The USEPA has made it clear these amendments are necessary for the state to retain its approved Section 404 Program status. The Council debated these issues but, for a variety of reasons, including the legislative process beginning before the completion of its work, did not come to consensus. Therefore, no recommendations on statutory language are contained in this report.

Members of the Council remained dedicated throughout the process and diligently addressed the issues delegated under 2009 PA 120. The Council would like to recognize and commend the personal involvement of MDEQ Director Dan Wyant and the cooperative and attentive staff of the MDEQ, Water Resources Division.

Statutory Charges

Section 30329(9) of 2009 PA 120 states:

(9) By August 15, 2012, the council shall submit a report to the governor, the department, and the standing committees and appropriations subcommittees of the legislature with primary responsibility over issues pertaining to natural resources and the environment. The report shall evaluate and make recommendations on all of the following:

(a) Improving coordination and reducing duplication of effort with the United States army corps of engineers.

(b) Potential long-term changes in program structure, including all of the following:

(i) Scientific methods to achieve more consistent and accurate determinations of wetland functions and values for reviewing applications for permits, watershed planning, conservation plans, and other purposes. These methods include rapid wetland assessment and landscape level wetland assessment.

(ii) The appropriate role of local units of government and conservation districts in the administration of this part.

(iii) A certification process for wetland professionals. The council shall consider information reported under section 30303b in evaluating and making recommendations under this subparagraph.

(iv) The definition of wetland and wetland delineation methods, including the role of hydric soils as a factor in wetland delineation. In making recommendations under this subparagraph, the council shall evaluate differences in the state and federal wetland programs.

(c) The appropriate means and level of program funding under this part.

(d) Minor project categories and general permits under section 30312b(1) to (3).

(e) The appropriateness of the provisions of section 30304b as a means of reducing regulatory burdens from dual federal and state regulation.

(f) The promotion of the development of wetland mitigation banks.

(g) Ways for the public and interested parties to advise the department on a continuing basis concerning the administration and enforcement of this part.

(h) Appropriate regulation of the siting, construction, and operation of cranberry production activities, in light of the benefit of cranberry production activities to the economy, the regulatory approach of other states, and other factors.

(i) The feasible and prudent alternative standard under section 30311 and consistent application of the standard.

(j) Methods to assist both of the following in successfully obtaining permits under this part in a timely manner:

(i) Individuals proposing a use or activity for their personal homesite.

(ii) Nonprofit organizations.

***Wetland Advisory Council Membership
(As of August 15, 2012)***

Joseph Rivet, Chair	Representing the association of County Drain Commissioners
Dan Wyant	Representing the Michigan Department of Environmental Quality
Dan Coffey	Representing the statewide association of realtors
Gary Dawson	Representing natural gas or electric utilities
Sue Elston	Representing the United States Environmental Protection Agency
Andy Such	Representing the statewide association of manufacturers
Susan Harley	Representing statewide environmental protection organizations
Deena Bosworth	Representing the statewide association of local units of government
Jeff King	Representing a wetland professional.
Erin McDonough	Representing statewide conservation organizations
John Niemela	Representing the general public
Chris Reidy	Representing USDA's Natural Resources Conservation Service
Lee Schwartz	Representing the statewide association of home builders
Stephen Shine	Representing the Michigan Department of Agriculture and Rural Development
Russ Mason	Representing the Michigan Department of Natural Resources
Grenetta Thomassey	Representing watershed organizations
Donald Uzarski	Representing university professors with wetland science expertise
Scott Piggott	Representing the largest statewide farm organization
Todd Wyett	Representing businesses
John Konik	Liaison from the United States Army Corps of Engineers

Methods/Activities

The Council utilized a consensus model for operating and the development of recommendations. All recommendations were unanimous unless concerns were noted. The Council never reached the point of requiring a vote on any single recommendation put forth.

The Council began meeting regularly in January of 2010. No meetings were held for several months during the change in Gubernatorial Administrations at the end of 2010, early 2011. All meetings were noticed and open to the public.

Council activity was as follows:

- The initial phase of the work involved in-depth presentations from MDEQ staff regarding current methodology and program administration. Additional presentations were made to provide baseline knowledge for all members.
- The Council analyzed the requirements and responsibilities it was charged with under 2009 PA 120 and gathered all necessary information.
- The Council created three committees to complete the work on items due in the October 1, 2010, report. They were as follows:
 - Permit Processing and Efficiency
 - USEPA Program Review Response
 - Program Efficiency and Mitigation Sequencing
- The Council held two public meetings to take input on the program; meetings were held in Bay City on August 11, 2010, and in Holland on August 18, 2010.
- The committees met and forwarded recommendations to the Council.
- Initial Council recommendations were developed and sent to the Legislature
- In early 2011, committees were adjusted to address the final report as follows:
 - Permit Processing and Efficiency
 - Program Efficiency
 - USEPA Program Requirements and Federal Coordination
- On June 9, 2011, a meeting was held in the House Office Building to specifically reach Legislators on the process. Further, Legislative staff from all Caucuses was invited to every meeting.
- On October 31, 2011, the MDEQ implemented Minor and General Permit categories.
- On December 12, 2011, the MDEQ put forth a proposal reform which became the basis for several Council recommendations.
- In April 2012 Representative Jim Stamas agreed to become sponsor of required legislation to become compliant with USEPA requirements for the Section 404 Program.
- On June 14, 2012, Governor Rick Snyder signed 2012 PA 164 implementing the Council recommendation extending permit application review time limits.

Copies of all Council meeting agendas, minutes, and presentations are available on the MDEQ Web site: <http://www.Michigan.gov/deq>. All other additional material and correspondence is on file and available for public inspection.

Recommendations

1. Improving coordination and reducing duplication of effort with the United States Army Corps of Engineers.

The Council has reviewed the MDEQ/United States Army Corps of Engineers (USACE) joint permit application form, as well as the 2011 Memorandum of Understanding between the MDEQ and the USEPA concerning the administration of the Clean Water Act Section 404. The Council believes there is coordination between the entities and this coordination has reduced the burden on applicants. The Council has made a recommendation in its October 1, 2010, report to have the application and its processing independently reviewed.

2. Potential long-term changes in program structure, including all of the following:

- (i) Scientific methods to achieve more consistent and accurate determinations of wetland functions and values for reviewing applications for permits, watershed planning, conservation plans, and other purposes. These methods include rapid wetland assessment and landscape level wetland assessment.***

The Council recommends that: 1) the MDEQ use Michigan Rapid Assessment Method (MIRAM), and other scientific methods for wetland monitoring, for evaluating potential preservation sites, and as one tool when there is a dispute regarding the benefits derived from a wetland (e.g., functions and values or quality of a wetland); 2) the MDEQ continues to develop MIRAM as a tool to be used by staff and consultants, and work with the MIRAM Development Committee to further calibrate the method and provide future training; 3) MIRAM is used when a permit applicant requests its use as a potential tool to resolve a disagreement between MDEQ staff and a permit applicant or consultant; and 4) that the MDEQ establishes a database which documents the use of MIRAM on individual permit applications by staff and/or consultants and that such a database be shared with stakeholders as part of a program review before additional implementation.

- (ii) The appropriate role of local units of government and conservation districts in the administration of this part.***

The Council believes the pilot program under Section 324.30303b(1) should be considered a success and that the MDEQ continues the program. The MDEQ recognizes the value of local programs operated pursuant to Section 324.30303b(1) by local units of government, conservation districts, not-for-profits, and wetland professionals to assist landowners and others seeking assistance to pursue the activities in 324.30303b(1). The preliminary indications are that the pilot programs with qualified and properly trained personnel have had a positive effect on the quality of permit applications and have improved the efficiency of program delivery.

The Council recommends that the program continues, but qualify to provide the services described in Section 30303b(1), each participant must:

- a. Possess qualified (proper educational or experience background) staff to carry out the services to be provided;
- b. Have the qualified staff trained by the MDEQ in the services they will deliver;
- c. Clearly spell out what services the participants will provide and not provide pursuant to this section and only provide services for which their personnel are qualified and trained;
- d. Submit annual reports to the MDEQ and participate in a quarterly conference call with the MDEQ indicating what services the participants have provided in the preceding year;
- e. Enter into a Memorandum of Understanding with the MDEQ that will extend five years, but be subject to unilateral revocation by the MDEQ annually;
- f. Operate in a way that is revenue neutral for the MDEQ except for the MDEQ's review of annual reports and issuing of Memoranda of Understanding between the participants and the MDEQ.

Recommendations (continued)

- (iii) A certification process for wetland professionals. The council shall consider information reported under section 30303b in evaluating and making recommendations under this subparagraph.*

The Council recommends a certification process not be pursued. Although a well-intentioned idea, in practice, it is not feasible due to economic and technical constraints. Establishing a certification program would require significant financial investment to establish a certification protocol and a long-term annual investment to provide a unit within the MDEQ to ensure proper compliance with the certification. Without a strong compliance program, there is no way to ensure that wetland professionals would work within the limits of any certification or licensing program. Wetland professionals can have tremendous pressure placed on them by clients that often want to minimize the extent of jurisdictional waters on their property. Without proper oversight, there is a significant likelihood of potential abuse of any certification or licensing.

- (iv) The definition of wetland and wetland delineation methods, including the role of hydric soils as a factor in wetland delineation. In making recommendations under this subparagraph, the council shall evaluate differences in the state and federal wetland programs.*

The Council recommends that draft legislation be prepared that would reinstitute the 2-parameter (Michigan Department of Natural Resources [MDNR]/MDEQ-administered in 1980-2009) approach to wetland delineations, as compared to the existing, relatively new (2010-2011) 3-parameter approach. The Council also recommends that language be proposed as part of any draft legislation that would provide an option for an applicant to use a 3-parameter approach during a formal MDEQ Wetland Assessment or contested case (not permitting) process if they choose.

Regarding this recommendation, input was received from several wetland consultants. While there was clearly differences in detailed opinion, consultants all agreed that the 2- or 3-parameter approach would result in the same wetland boundary line 99 percent of the time, with less time (and therefore cost) involved using the 2-parameter approach. The consultants also agreed that the federal 3-parameter approach is more scientific and that the currently-required use of the 3-parameter approach over the past two years has resulted in MDEQ staff being more careful/detailed in their review of consultants' wetland boundaries.

Further, using the 2-parameter approach, there could be slightly more area determined to be wetland in certain circumstances than if using the 3-parameter approach, due to federal application of hydrological indicators (not necessarily hydric soils). The consultants interviewed all agreed that wetland areas that might be "lost" (deemed to be upland) under application of either approach are typically of low ecological value.

In summary, staff, consultants, environmental groups, and the regulated community recognize that in the vast majority of cases the use of hydric soils for delineation is an unnecessary expense. Although, all agree including hydric soils is the more scientific approach. Although the size of the parcel impacted may be small, the economic or practical impact to the property owner can be significant. The property owner must retain the right to utilize the three part analysis including consideration of relic hydric soils. Protection of private property rights remains an essential part of our government system and must remain a critical factor in the wetland regulation process.

It should be noted that although this is a consensus recommendation, some Council members have expressed concern about deviating from the federal standard. Ultimately, the cost savings to applicants with virtually no change in outcomes led to the recommendation.

3. The appropriate means and level of program funding under this part.

The Council recommends a funding strategy outlined in the Public Sector Consultants Report Michigan Wetland Program – Options for Long-Term Funding. In summary, this includes General Fund or unclaimed bottle deposit funding on a permanent basis along with making the fee structure current with existing policy and practice. Rationale for the recommendations is contained in the report. It is included as *Attachment 1*.

Recommendations (continued)

The report indicates that the existing fee structure for the Wetland Permit Program covers only about 15 percent of the program costs. This percentage is far below other programs within the MDEQ. Increasing fees would reduce the burden on the general or other funding source required to administer the program. Significantly increasing the level of fees would have the added impact of discouraging applications to disturb wetlands. Although substantially increased fees are not the recommendation of the Council, there were members of the Council that advocated that position.

The Council would like to thank the Erb Family Foundation for providing the funding to complete the Public Sector Consultants Report, as well the Michigan United Conservation Clubs for acting as fiduciary.

4. Minor project categories and general permits under section 30312b(1) to (3).

The Council recommends the ongoing implementation of the General and Minor Permit categories issued by the MDEQ on October 31, 2011. It further recommends the Minor and General Permit categories be reviewed every five years or as pertinent issues arise as part of an ongoing stakeholder program review. Finally, it recommends the Legislature put in place an appropriate fee structure for the permitting process. The Minor and General Permit categories are *Attachment 2*.

5. The appropriateness of the provisions of section 30304b as a means of reducing regulatory burdens from dual federal and state regulation.

The Council has examined the value of USACE nationwide permits as well as discussed State Programmatic General Permits. The Council believes there exists opportunity to reduce regulatory burdens by the development and implementation of Supplemental Permit/General Permits (GP). Due to the issuance of General and Minor Permit categories and the recent enactment of 2012 PA 247 concerning shoreline wetland regulation, the statewide permits have not been fully explored.

The Council recommends the MDEQ continue to explore obtaining State Programmatic General Permits available under Section 404 to reduce instances of dual federal and state regulatory jurisdiction.

6. The promotion of the development of wetland mitigation banks.

The Council recommends the MDEQ proceeds with an expansion of the current mitigation program. This should include:

- (i) Increased bank service areas so long as they are located within the same watershed or similar ecoregion that will ensure no net loss of the wetlands resources and protection of the predominant wetland functions of the area.
- (ii) Developing a State-backed low interest loan program for municipalities utilizing the State Water Pollution Control Revolving Fund.
- (iii) Increased flexibility in releasing credits for both private and publicly owned banks if the benefits of the mitigation bank have been properly established and the credits are revocable.
- (iv) Allowance for preservation in areas where mitigation is feasible and no unacceptable disruption to aquatic resources will take place.
- (v) Devotion of a staff person to wetland banking activities.
- (vi) Make low-interest loans available to non-profit entities developing wetland mitigation banks if an appropriate funding source can be identified

Recommendations (continued)

7. *Ways for the public and interested parties to advise the department on a continuing basis concerning the administration and enforcement of this part.*

The Council recommends:

- (i) The MDEQ regularly reaches out to the public specifically through municipal building and planning departments as well as contractors, developers, farmers, natural resource professionals, and real estate professionals with information and training on permitting requirements, especially minor project and general permit, or other new permitting requirements.
 - (ii) Recommends the MDEQ convenes stakeholders every other year to review and make suggestions for improvements and to take comments on the program.
8. *Appropriate regulation of the siting, construction, and operation of cranberry production activities, in light of the benefit of cranberry production activities to the economy, the regulatory approach of other states, and other factors.*

Since the enactment of 2009 PA 120, the MDEQ has not received any permit applications for cranberry production activities. Therefore, the Council has had limited information related to the specific needs of potential cranberry growers. Further, some members believe that a specific category for cranberry activities is unnecessary. Discussions have taken place related to the need to have specific regulations for this activity based on the lack of permits. In addition, the Council has been presented information that production of other crops should receive the same status currently under the law as cranberries and the fee waiver for pre-application meetings be extended. Similar to the exemption discussion, the Council believes any change to the statute specific to this area is a legislative function.

Based on the discussion above, the Council makes no recommendation on the siting, construction, and operation of cranberry production activities.

9. *The feasible and prudent alternative standard under section 30311 and consistent application of the standard.*

The Council reviewed and is satisfied with new Feasible and Prudent Alternative Standards presented by the MDEQ on September 22, 2011, which are consistent with USEPA's review of the Section 404 Program (WRD-003, August 2011, Attachment 3). The Council recommends continued implementation and utilization of those standards.

10. *Methods to assist both of the following in successfully obtaining permits under this part in a timely manner:*

- (i) *Individuals proposing a use or activity for their personal homesite.*
- (ii) *Nonprofit organizations.*

As noted in recommendations numbers 2(ii) and 4, the Council makes recommendations to continue and improve the General and Minor Permit categories. This new permitting option addresses nearly all personal homesite activities requiring a permit. This also services most non-profit group circumstances.

The Council was made aware of concerns related to permitting of wetland restoration projects by various non-profit groups. The Council also considered the concept of allowing the MDNR permitting authority for all wetland restoration and enhancement projects. The Council found several difficulties with this alternative, including the limited number of projects and complexity of dual agency permitting.

Included in the general permitting is a category for Wetland Habitat Restoration and Enhancement. The general permit is expected to address many concerns and facilitate more efficient permitting for these projects.

Recommendations (continued)

Under recommendation 4, the Council recognizes the value conservation districts and local units of government can have in the development of complete permit applications that are appropriate for a desired activity. Local resources available to property owners will assist them in obtaining permits in a timely manner.



**MICHIGAN
HOUSE OF REPRESENTATIVES
P.O. Box 30014
LANSING, MICHIGAN 48909-7514**

Notice

STANDING COMMITTEE MEETING

Natural Resources, Tourism, and Outdoor Recreation

Rep. Frank Foster, Chair

Date: Tuesday, September 11, 2012

Time: 9:00 A.M

Place: Room 307 House Office Building, Lansing, MI

AGENDA

- | | |
|---------------------|---|
| HB 5673 (Pscholka) | Water; quality; strategic water quality initiatives fund; modify grant and loan programs. |
| HB 5674 (Opsommer) | Water; quality; state water pollution control revolving fund; modify definition of disadvantaged community to be eligible for clean water assistance. |
| HB 5675 (MacGregor) | Water; quality; safe drinking water revolving fund; revise designation of disadvantaged community and modify points awarded for funding priorities. |
| HB 5676 (Kowall) | Water; quality; transfer of money from the Great Lakes water quality bond fund; modify distributions. |

Presentation

Wetland Advisory Council

OR ANY BUSINESS PROPERLY BEFORE THIS COMMITTEE

Individuals who wish to bring written testimony need to supply a minimum of thirty copies for distribution.

Individuals needing special accommodations to participate in the meeting may contact the Chair's office.

David Mead, Committee Clerk, 517-373-2013
email: dmead@house.mi.gov

Date posted: 9/6/2012

Schedule changes or cancellations available at <http://www.legislature.mi.gov> or 24-hours at (517) 373-8140.
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